HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No. 201 of 2001
(Old No. 554/ 1998)

Balvinder Singh @ Tigar
Proprietor M/s Soniya Gas Agency
Bajpur road, Kashipur
P.S. Kashipur
District U. S. Nagar .....Applicant

Versus

1. M/s Satyam Agencies through Proprietor
   Sri Gurudeep Singh Kashipur
   P.S. Kashipur
   District U. S. Nagar
2. Sri Jeet Singh S/o Sri Achchar Singh
   R/o Mohalla Maheshpura
   Jeet Colony, Kashipur, P.S. Kashipur
   District U. S. Nagar
3. State of Uttaranchal ...Respondents

Sri Rajendra Singh learned counsel for the applicant.
Sri Nandan Arya learned A.G.A. for the State.

Hon'ble J. C. S. Rawat, J.

1. The petition under section 482 Cr.P.C. has been filed for quashing the orders dated 17.01.1998 passed by the Addl. Sessions Judge, Nainital in criminal revision No.122/1996 and dated 20.11.1996 passed by the Addl. Chief Judicial Magistrate, Kashipur in criminal case No.574/1995 under section 138 of the Negotiable Instrument Act.

2. Brief facts of the case are that on 15.04.1995 the respondent No.2-Jeet Singh filed a complaint before the Magistrate against the applicant under section 138 N.I. Act alleging therein a cheque was issued by the applicant in favour of respondent No.2-complainant. When the respondent No.2-complainant submitted the cheque before the Allahabad Bank, Branch Kashipur the

cheque was dishonoured by the bank due to insufficiency of funds. Thereafter, a notice was sent by the private respondents through registered post to the applicant. When the payment was not paid by the applicant, the present complaint was filed. After examining the witnesses, the applicant was summoned under section 138 N.I. Act by the learned Magistrate. Thereafter, the applicant filed objection under section 204 Cr.P.C. by moving a recall application dated 22.9.1995. The case was contested on the ground that Jeet Singh had no authority to file the compliant. After hearing the parties, the learned Magistrate rejected the said objection vide order dated 22.11.1996. Feeling aggrieved by this order, the applicant preferred a revision before the Addl. Sessions Judge, who also dismissed it by the impugned order dated 17.01.1998. The addl. Sessions Judge was of the view that the said cheque was issued by the applicant in the name of the respondents. While the cheque was sent to the bank under the signature of Gurdeep Singh-the proprietor of M/s Satyam Agencies. Jeet Singh, who is the another partner of Satyam Agencies, filed the complaint in the court. Jeet Singh being the partner of the respondent No.1 is competent to file the complaint. Feeling aggrieved by this, the applicant has come up before this Court

3. Heard Sri Rajendra Kotiyal learned counsel for the applicant and Sri Nandan Arya learned A.G.A. for the State. The respondent No.2-Jeet Singh has died. None is responding on behalf of the respondent No.1.

4. Learned counsel for the applicant contended that para 1 of the complaint reveals that the partnership firm

was carrying out the sale and purchase of the lotteries. It is not proved by any evidence that the said firm was authorized to sell and purchase the lottery tickets. Learned A.G.A. refuted the contention. Perusal of the record reveals that the complainant filed a complaint against the applicant alleging therein that he was carring out the business of lottery and the applicant-accused had taken lottery tickets from him to sell those tickets on retail and the said amount was not paid to the complainant. It was pointed out that if the complainant had no licence to carry out the business of lottery, the act of the complainant is illegal and any transaction made under the said act is illegal. It is also pertinent to mention here that the complainant has to adduce the evidence before the trial court whether he had a lottery licence at the relevant point of time or not. This Court cannot give findings solely on the basis of averment made in the petition. This is a matter of evidence which can be raised and ascertained at the time of trial.

5. Learned counsel for the applicant further contended that the complainant had not mentioned in the complaint that the said firm was registered. If the firm is not registered, the partner of the firm cannot prosecute the applicant as the complaint is barred under section 69 of the Indian Partnership Act. Learned A.G.A. refuted the contention. It is also pertinent to mention here that this fact also relates to the evidence and the same can be considered at the time of trial. This plea is a factual plea and it requires further proof. It is not permissible for the High Court to look into materials, the acceptability of which is essentially a matter of trial. While exercising jurisdiction under section 482 Cr.P.C., it is not possible for this Court to act as if it is a trial court.

If the facts relates to the factual position, the parties have right to adduce the evidence at the time of trial and the complaint cannot be disposed of without giving proper opportunities to the parties.

6. In view of the foregoing discussion, the petition lack merit and is liable to be dismissed. The petition is dismissed accordingly.

(J.C.S. Rawat, J.)

Dated 17.04.2006

LSR